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In the Supreme Court of the United States

OCTOBER TERM, 1993

DONALD R. BURKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was denied a fair trial when the trial judge excluded from evidence an anonymous note purportedly written by another person claiming to have committed the murder for which petitioner was convicted.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. A, is reported at 36 M.J. 447. The opinion of the Air Force Court of Military Review, Pet. App. B, is not officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 29, 1993. The petition for a writ of certiorari was filed on July 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. III 1991).

STATEMENT

Petitioner, a member of the United States Air Force, was tried by a general court-martial for premeditated murder and aggravated assault, in violation of Articles 118 and 128 of the Uniform Code of Military Justice, 10 U.S.C. 918 and 928. He was convicted of unpremeditated murder and aggravated assault, and he was sentenced to confinement for life, a dishonorable discharge, and reduction to the lowest enlisted grade. The convening authority affirmed the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence. The Court of Military Appeals granted discretionary review and affirmed.

1. Sergeant Joseph Handy was beaten to death while working alone in the early morning of September 25, 1989, at George Air Force Base in California. Behavioral analysis interviews by agents of the Air Force Office of Special Investigations (OSI) and subsequent polygraphs led the OSI to focus its investigation on petitioner. He ultimately confessed to killing Handy by numerous blows with an aluminum baseball bat. Petitioner amplified his oral confession in two written versions. In his confessions, petitioner expressed outrage at Handy's alleged admission that he had molested a young girl and Handy's boast that he was getting away with it. Petitioner claimed that he decided to teach Handy a lesson by beating him. After beating Handy in his office, petitioner took him to the bathroom to clean away the blood. While there, petitioner began to beat Handy again and eventually killed him. Pet. App. 2a-3a, 17a-18a.

Three days after confessing, petitioner recanted and claimed that the OSI had coerced him into making the statements. Rather, he claimed, three men with stars painted on their cheeks and earrings in their right ears had forced him to take them to Handy's office, where two

of them beat Handy to death with a bat and an unusual weapon of some sort. Petitioner stated that those men threatened to injure his children if he mentioned the killing within four weeks. Pet. App. 3a, 18a-19a.

2. Petitioner's claim stems from the discovery on December 18, 1989, of an anonymous note in a security police van used to transport petitioner. The note purportedly exonerated petitioner in the death of Sergeant Handy.[1] The note was purportedly authored by a person named "Michael" who claimed that he was the homosexual lover of Sergeant Handy. "Michael" claimed that he and Sergeant Handy were members of a homosexual cult, and that Sergeant Handy was murdered by members of the cult for dishonoring the cult leader. "Michael" claimed he had written to local newspapers and Air Force authorities explaining the circumstances surrounding Sergeant Handy's death. He also promised to provide Air Force officials with evidence proving his allegations, including videotapes, pictures, maps, telephone numbers, and names. In fact, there was no evidence that anyone had in fact written the letters referred to in the note, and no evidence was provided to petitioner or Air Force officials as the note had promised. Pet. App. 3a-4a.

The parties stipulated that the note was found in an unlocked van at about 9 a.m. and that the van had been used that morning between 6 and 6:30 a.m. to transport petitioner and other confinees to and from breakfast. AX 26, ¶ 1d. No fingerprints were found on the note. Handwriting analysis failed to determine who had authored the note; the examiner's comparison of the note with an exemplar from petitioner was inconclusive. An OSI investigation based on the matters set forth in the note failed to uncover any relevant information. The identity

[1] A transcription of the note is appended as attachment 1 to AX 28.

of the author of the note was never determined. AX 26, ¶¶ 3-8, 11.

3. Before trial, petitioner's counsel filed a motion in limine seeking a ruling on the admissibility of the note. Tr. 52; AX 25. Counsel claimed the note was admissible on three grounds: (1) under Mil. R. Evid. 804(b)(5), the residual hearsay exception when the declarant is unavailable; (2) under Mil. R. Evid. 803(24), the residual hearsay exception when the availability of the declarant is immaterial; and (3) under Mil. R. Evid. 804(b)(3), as a statement against penal interest. Tr. 53-54. The prosecutor opposed petitioner's motion to admit the note on several grounds, among them that the declarant was not merely unavailable, but unknown, and that the note lacked the guarantees of trustworthiness necessary for it to be admissible under the residual hearsay exceptions. Tr. 56-57, 59-61.

The trial judge ruled that the note was inadmissible. Tr. 64. He noted that the purported declarant was not just unavailable, but was unknown. Tr. 62. He determined there was no way to test the trustworthiness of an anonymous note written by an unknown author. In fact, he said: "This anonymous letter does not even come close to the threshhold [*sic*] requirements for trustworthiness and reliability." Tr. 63. He also found that any probative value the note might have was substantially outweighed by the danger of confusion of the issues under Mil. R. Evid. 403. Tr. 64.

4. The court of military review affirmed. Pet. App. 16a-26a. It concluded that "there is a complete absence of any indicia of reliability." *Id.* at 22a. "Nothing presented by [petitioner] or available to the prosecution provided any semblance of trustworthiness to this document which could serve as a basis for the court members to conclude the document was an authentic, truthful representation of how [Sergeant] Handy was murdered." *Ibid.*

The court added that "[a]lthough there is no evidence of who authored [the note], all fingers point to [petitioner]." *Ibid.*

5. The Court of Military Appeals affirmed. Pet. App. 1a-15a. Like the trial court and the court of military review, the Court of Military Appeals found that the note lacked the necessary indicia of trustworthiness that would have allowed the note to be admitted under an exception to the hearsay rule. *Id.* at 6a-9a.[2] The Court also rejected petitioner's claim that the note was admissible under *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). *Chambers*, the court reasoned, does not entitle the accused to introduce evidence "the fundamental trustworthiness of which is wholly unestablished" by the defense at trial. Pet. App. 9a.

ARGUMENT

Petitioner has narrowed his argument from his submission in the courts below. In the military courts, petitioner argued that the note discovered in the security van was admissible under one or more of three different exceptions to the rule against hearsay, Mil. R. Evid. 803(24), 804(b)(3), and 804(b)(5). In this Court, petitioner no longer claims that the note was admissible under one of those exceptions; rather, he contends only that his due process rights were denied when the trial court excluded the note on the ground that it was inadmissible hearsay. Relying on this Court's decision in *Chambers* v. *Mississippi*, *supra*, petitioner contends

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[2] That court added that "we are at a loss to understand how it may logically be concluded that the *anonymous* writer of a self-incriminating letter has made any statement that truly is against the writer's penal interests. * * * A 'confession' by one who speaks from the shadows and remains unidentifiable hardly measures up to the rationale that a statement made against the declarant's own interests is, therefore, reliable." Pet. App. 8a n.2.

that the rule against hearsay must give way in circumstances like this one, where reliable evidence critical to the defense would be excluded from trial.

The flaw in petitioner's argument is that the note discovered in the security van was not reliable evidence. Each of the three courts below correctly found that petitioner had failed to establish that the note had sufficient indicia of reliability to warrant its admission.

Petitioner lists a variety of factors that, he claims, establish the reliability of the note. Pet. 5-8. None of the factors he cites, however, establishes that the note was written under circumstances indicating that the declarant was trustworthy. Since petitioner did not prove that the declarant penned the note under circumstances proving that he should be believed, the trial court correctly excluded the note from evidence.

Moreover, the factors petitioner cites to establish that the note was reliable cannot carry the weight he ascribes to them. While some of the factual assertions in the note are generally correct, those facts would have been available to anyone familiar with Sergeant Handy and the investigation of his death—petitioner himself, for instance. Also, many of the assertions in the note were never corroborated at all. There was never any evidence of a homosexual cult, and OSI found no evidence that Sergeant Handy had been involved in homosexual activity. Tr. 694, 742. Petitioner also claims that the events described in the note were corroborated by other evidence. In particular, he points to evidence that a second weapon was used to murder Handy, evidence of a footprint that did not match petitioner's shoes, and evidence that an earring back was found near the crime scene. While a pathologist testified that a second weapon in addition to the baseball bat could have been used to inflict the injuries to Handy, Tr. 880-881, petitioner admitted that he disposed of a metal object by throwing it

into a dumpster after the murder, Tr. 1123. Petitioner also admitted that he had ample opportunity to dispose of the shoes he might have worn on the night of Handy's murder, Tr. 1157, so petitioner himself could have left the footprint. And anyone could have dropped the earring back. It was found about six feet from Sergeant Handy's body next to the women's restroom. Tr. 687. Between eight and ten women worked in that particular building, and they all wore earrings. Losing an earring back is not an uncommon event. Tr. 786-787.

Petitioner claims there was no evidence that the note was a fabrication based on the handwriting analysis. The examiner, however, could not identify the author of the note and his comparison of the note with petitioner's exemplar was inconclusive. AX 26, ¶ 8. Thus, there was no evidence the note was not a fabrication. Also, the note was found in a van that was left unlocked and unattended—a van that petitioner had occupied just a few hours before. Practically anyone, including petitioner, could have planted the note. Petitioner further claims the contents of the note support his claim that he confessed to protect his children. But petitioner never expressed any concern for the safety of his children to OSI. Tr. 695-696, 1205-1206, 1208. If, as he said at trial, petitioner was concerned that the cult members would retaliate against his children if he told the authorities about Handy's murder, surely petitioner would have insisted that the OSI protect his children; otherwise, he would have feared that the cult members might injure his family once they learned that he was in police custody. In sum, the factors petitioner invokes to establish the reliability of the note are unimpressive.

This case is vastly different from *Chambers* v. *Mississippi*, *supra*. There, this Court held the defendant's right to present a defense was infringed by a state voucher rule. In that case the defendant was alleged to

have murdered a police officer. Some witnesses testified the defendant fired the shot that killed the officer, while others testified someone else had done so. Another man told defense counsel, as well as three other individuals, that he, not the defendant, fired the shot. The prosecution, however, did not call that man at trial. Instead, the defense called him as a witness, and he denied having shot the officer. Relying on the voucher rule, a common law rule that barred a party from impeaching its own witness, the trial judge refused to permit the defense to confront the witness with his prior inconsistent statements. The trial court also denied a defense request to call the three persons to whom the witness had previously confessed. This Court reversed, holding that the combined operation of the state voucher and hearsay rules denied the defendant a fair trial. 410 U.S. at 295-302. In particular, the Court noted that the witness's statements "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." *Id.* at 300. The Court also noted that any question of the truthfulness of the statements was allayed by the declarant's presence at the trial. *Id.* at 301 & n.21.

This Court in *Chambers* found that several factors, taken together, provided adequate assurance of the truthworthiness or reliability of the hearsay statements in that case. 410 U.S. at 300-301. None of those factors, however, is present here. First, the statement here was not made spontaneously to a close acquaintance of the declarant shortly after the commission of the crime. Second, the statement was not sufficiently corroborated by substantial, independent evidence, as explained above. Third, the statement was not against the declarant's interest, because the note was anonymous, no declarant was ever discovered, and petitioner himself could have authored the statement. And, fourth, the declarant was

not available for cross-examination by the government (unless, of course, petitioner wrote the note). Under these circumstances, the Court's decision in *Chambers* did not require admission of the note. See *United States* v. *Hinkson*, 632 F.2d 382 (4th Cir. 1980) (holding third party's confession inadmissible because it lacked substantial guarantees of trustworthiness); *United States* v. *Hughes*, 529 F.2d 838 (5th Cir. 1976) (finding *Chambers* inapplicable because, inter alia, the hearsay statement bore no assurances of trustworthiness).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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